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Nos. 88-1249 and 88-1250

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, *et al.*,
*Petitioners,*
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
*Petitioners,*
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF COMMUNICATIONS SATELLITE CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF COMMUNICATIONS SATELLITE CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Communications Satellite Corporation ("COMSAT") respectfully submits this brief *amicus curiae* in support of the above-captioned petitions for writ of certiorari to review a decision of the United States Court of Appeals

for the District of Columbia Circuit. The decision is reported at 826 F.2d 1101 and is reprinted in Appendix A (1a-40a) to the petition filed by Southern Bell Telephone & Telegraph Co., *et al.*, and Appendix A (1a-39a) to the petition filed by New England Telephone and Telegraph Co., *et al.* Counsel for the parties have consented to the filing of this brief.

## INTEREST OF AMICUS CURIAE

COMSAT is a private satellite communications corporation established pursuant to an Act of Congress, the Communications Satellite Act of 1962, 47 U.S.C. § 701 *et seq.* By the terms of that Act, COMSAT is deemed a common carrier under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* ("the Act"). As such, COMSAT is subject to rate regulation by the Federal Communications Commission ("FCC").

In January 1988, the FCC resolved certain issues in an investigation of COMSAT's rates by ordering COMSAT to refund to its customers revenues for past periods on the ground that such revenues represented earnings in excess of those permitted under a previously prescribed rate of return. In its order, the Commission expressly relied on the decision below to conclude that it had the statutory power to order such refunds. COMSAT has petitioned for review of that order in the D.C. Circuit, where briefing has been deferred pending the disposition of the petitions for certiorari in the instant case. COMSAT thus is directly affected by the decision of which review is now sought and has a strong interest in the ultimate resolution of the issues posed. COMSAT was an *amicus curiae* before the court below.

## ARGUMENT

The court of appeals' holding has far reaching implications going beyond the specific refund obligation imposed by the FCC on AT&T and the regional Bell operating companies. Moreover, that holding is in direct conflict with the governing statute and long settled precedent interpreting it and analogous statutory schemes.

### I.

As recognized by the judges who dissented from the denial of rehearing *en banc* by the court below, "the fundamental issue" presented here "is of manifest importance." [1] This case does not affect only the parties involved, nor can it be reduced to a dispute over $101 million. Rather, this case has important consequences for many of the communications common carriers regulated by the FCC and for a number of other regulated utilities as well.

This case is the first in the long history of FCC ratemaking in which the FCC has sought to order refunds for past periods without adhering to the specific provisions of its enabling statute.[2] The importance of this case is underscored by the fact that since the FCC's decision in this case, it has on several occasions sought to extend its newly asserted statutory power. As noted by petitioners,[3] soon after the FCC imposed the refund obligation on the Bell companies for alleged past excess earnings challenged in this case, it initiated a rulemaking

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[1] Southern Bell Telephone & Telegraph Co., *et al.* Appendix ("Southern Bell App.") at 44a; New England Telephone and Telegraph Co., *et al.* Appendix ("New England App.") at 135a (Starr, J., joined by Buckley and Williams, J.J., dissenting).

[2] *See* Southern Bell Telephone & Telegraph Co., *et al.* Petition for a Writ of Certiorari ("Southern Bell Pet.") at 4-7; New England Telephone and Telegraph Co., *et al.* Petition for a Writ of Certiorari ("New England Pet.") at 10.

[3] Southern Bell Pet. at 7; New England Pet. at 8-9.

proceeding in which it ultimately adopted a rule requiring all dominant domestic common carriers to refund automatically any earnings in excess of their previously prescribed rate of return—regardless of whether the FCC had investigated the rates that ultimately produced those earnings prior to their going into effect or whether the FCC had imposed an accounting order as provided for in Section 204(a) of the Act.[4]

In January 1988, the Commission invoked the same asserted statutory power when it ordered COMSAT to refund to its customers the sum of $38.755 million for past periods based solely on a finding that this was the amount by which COMSAT had exceeded a previously prescribed rate of return. The FCC, relying on the holding of the court of appeals in the instant case, found it unnecessary even to discuss COMSAT's arguments that the Commission lacked the statutory power to take such action.[5]

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[4] *Authorized Rates of Return for Interstate Services of AT&T Communications and Exchange Telephone Carriers,* 50 Fed. Reg. 41,350 (1985) (subsequent FCC history omitted). The D.C. Circuit subsequently invalidated these rules on other grounds in *American Tel. & Tel. Co. v. FCC,* 836 F.2d 1386 (D.C. Cir. 1988) (*"Rulemaking Case"*), New England App. at 141a. However, two members of the panel in the *Rulemaking Case* stated that the decision from which certiorari is now sought had dispositively resolved the statutory question; one member of that panel disagreed, stating that the refund rule adopted by the Commission was inconsistent with the statutory scheme.

[5] *Communications Satellite Corp.,* 3 FCC Rcd 2643, 2645 (1988). As noted above, COMSAT has petitioned for review of that order, and the D.C. Circuit has deferred briefing pending resolution of this case. Since the release of the COMSAT rate order, there has been at least one other major rate investigation in which the FCC has ordered refunds for past periods even though the conditions of Section 204(a)—suspension of rates, investigation and imposition of an accounting order—had not been met. *See Annual 1988 Access Tariff Filings,* Memorandum Opinion and Order, FCC 88-420 (released Dec. 27, 1988). Petitions for reconsideration of that decision are now pending before the FCC, and it is noted here only

The FCC action sustained by the court below may have consequences that go beyond the scope of the Communications Act. As noted by petitioners,[6] the Communications Act was patterned on the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, which also was the model for the Federal Power Act, 16 U.S.C. § 791a *et seq.*, and the Natural Gas Act, 15 U.S.C. § 717 *et seq.* Each of these statutes reflects a carefully crafted scheme in which the ability of the regulatory agency retroactively to modify a carrier's charges is carefully circumscribed. Under none of these statutory schemes may the carrier or the regulatory agency design present or future rates to compensate for or redress the effect of events that took place in the past; instead, retroactive relief is limited to certain circumstances not present here. It is in this sense that Judge Starr noted that the instant case presents a "pivotal statutory issue cutting across agency lines." [7]

Ultimately what is at issue in this case is whether an agency may, through reliance on general provisions like Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), rewrite a statute to confer new powers on itself. Judge Starr's concurring opinion in the *Rulemaking Case* squarely recognized the heart of the matter: "we must not permit those quasiautonomous creatures of the political branches to tear asunder that which the representatives of the people have seen fit to ordain and maintain for a quarter of the Nation's history." [8] We show below that this is precisely what the FCC has done.

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to show that the agency has continued to adhere to its expansive interpretation of its statutory authority.

[6] Southern Bell Pet. at 12, 13 & n.21, 16 n.25; New England Pet. at 3 n.1.

[7] Order denying suggestion for rehearing *en banc*, Southern Bell App. at 44a; New England App. at 135a (Starr, J., joined by Buckley and Williams, J.J., dissenting).

[8] *Rulemaking Case, supra* n.4, 836 F.2d at 1396, New England App. at 159a (Starr, J., concurring).

## II.

The decision of the court of appeals is fundamentally erroneous because, as noted in the dissent to the denial of rehearing *en banc*, "the FCC has . . . purported to exercise a power which Congress never conferred upon it." [9] The retroactive refund power that the FCC now asserts certainly cannot be found in the statutory provisions, taken alone or in combination. Moreover, the agency's action is at odds with over fifty years of agency and judicial interpretation of this and analogous statutory schemes.

Congress set out in the Communications Act a regulatory regime that gives the FCC power to regulate rates but reflects the well established prohibition against retroactive ratemaking, with carefully circumscribed refund power.[10] Under Section 204(a), the FCC may suspend a carrier's new or revised tariff for a specified period and investigate its lawfulness.[11] If the FCC has not completed its investigation by the end of the suspension period, and the carrier puts the tariff into effect, the FCC may impose an accounting order requiring the carrier to keep accurate account of all amounts received from new or increased charges. Should the FCC ultimately determine that the charges exceed that which is just and reasonable, it may then order the carrier to refund the difference between the tariff filed and the charges ultimately approved.

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[9] Southern Bell App. at 44a; New England App. at 135a (Starr, J., joined by Buckley and Williams, J.J., dissenting).

[10] *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31-32 (1926); *Galveston Elec. Co. v. City of Galveston*, 258 U.S. 388, 395 (1922); *American Pub. Gas Ass'n v. FPC*, 567 F.2d 1016, 1057 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 21 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951).

[11] 47 U.S.C. § 204(a).

Section 205 applies to a carrier's existing tariffs. Under that section, the FCC may investigate a carrier's charges on its own motion or upon a complaint, and if it finds that they are not just and reasonable, it may "determine and prescribe what will be the just and reasonable . . . charges to be *thereafter* observed." [12] Under Section 205, the FCC cannot impose an accounting order or subsequently order refunds with respect to the investigated rates.

The statute carefully balances the interests of carriers and their customers. A carrier initiates tariff filings, but the agency has an opportunity to review the new rates before they become effective to confirm that the carrier has filed in accordance with all pertinent requirements. The agency may suspend the new rates and begin an investigation. If the investigation extends beyond the statutorily prescribed suspension period, the carrier may put the new rates into effect, but the agency has the option of imposing an accounting order to preserve its authority to order refunds should it ultimately determine that the tariffs were not valid when filed.

Rates that go into effect without an accounting order are the only amounts that the carrier may charge and its customers must pay, with no provision for refunds or retroactive increased charges. If the carrier believes that its existing rates are producing unreasonably low earnings, it may file higher rates that are subject to the Section 204 review authority. On the other hand, if the agency, after a Section 205 investigation, determines that a carrier's existing rates are unreasonably high, it may order the carrier to lower its rates to a level then deemed reasonable. But rate changes, whether proposed by a carrier or ordered by the FCC, can only be effective on a prospective basis.

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[12] 47 U.S.C. § 205(a) (emphasis added).

The court below fails to apply the statutory provisions mandated by Congress. Basing its decision upon its expansive interpretation of the court of appeals' earlier opinion in *Nader v. Federal Communications Commission*, 520 F.2d 182 (D.C. Cir. 1975), the court reasons that if the FCC has the power to prescribe a rate of return—as *Nader* held—then it must have the power to enforce that prescription retroactively through a refund order.

The court below misreads *Nader*. The *Nader* court ruled only that the FCC could properly determine AT&T's allowed rate of return and authorize AT&T to use that rate of return in filing its rates, while the agency continued its investigation into AT&T's rate base and the other elements that go into the ratemaking process.[13] *Nader* did not purport to change the FCC's basic method of ratemaking, nor bestow any special significance on a rate of return prescription. In particular, *Nader* did not hold that a prescribed rate of return has the attributes of a prescribed rate under Section 205 of the Act; to the contrary, it explicitly stated that the "claim that a rate of return is equivalent to rates must be rejected since a rate of return is merely one component of a rate."[14]

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[13] In particular, the court stated:

> Obviously, reaching a decision on each of the components that make up a rate is a time-consuming task, especially when the Commission undertakes to reevaluate the economic principles for making these determinations. If the Commission can effectuate its decision as it adjudicates each component of the rate, the public more rapidly receives the benefit of the protection inherent in the Commission's authorization to prescribe just and reasonable charges. Therefore, we believe that the Commission's Phase I order prescribing AT&T's rate of return was in the public interest . . . .

520 F.2d at 204.

[14] *Id.* at 201. When a rate of return is prescribed, the carrier must file rates designed to achieve that return, and the FCC will scrutinize those rates to determine whether the projections are reasonable. But as New England Telephone petitioners show (Pet.

Nor did *Nader* "bring[] with it an enforcement mechanism" that authorizes the FCC to set future rates to compensate for past events;[15] again to the contrary, *Nader* reaffirmed "the cardinal principle" barring retroactive ratemaking[16]—namely, that neither a utility nor an agency may set rates to recoup past losses or refund past surpluses.

The court below recognizes that Section 205 by its terms does not confer the refund authority claimed by the FCC. However, it puts Section 205 together with Section 4(i) of the Act—which confers on the FCC a general power to perform any and all acts and make rules and regulations "not inconsistent" with the Act "as may be necessary in the execution of its functions"[17]—to uphold the refund order. The court's rationale is that since the FCC can prescribe a rate of return under Section 205, Section 4(i) authorizes it to enforce that prescrip-

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at 11), no one can be sure that the return achieved will equal or be greater or less than the prescribed return no matter how meticulous the carrier's projections. That is so because when carriers are calculating their rates, they of necessity must forecast future traffic levels along with projected costs and revenues. If the actual demand, costs and revenues are (for whatever reason) different from the estimates—which, given the inherent imprecision of estimates, will almost always be the case—the carrier's actual return will differ from the allowed rate of return upon which the carrier's tariffs were based. *See, e.g., American Tel. & Tel. Co.*, 42 F.C.C.2d 293, 300 (1973). Given that a rate of return prescription is by its nature therefore simply a prescribed goal, there is no more justification for retroactive refunds with respect to a rate filed in response to a rate of return prescription order than for such refunds with respect to an ordinary rate filing—a power the Commission does not claim to possess. Rather, the issue with respect to rate of return is the same as that for the other components of the charge —namely, whether the forecasts were reasonable when made.

[15] *Rulemaking Case, supra* n.4, 836 F.2d at 1395, New England App. at 156a (Starr, J., concurring) (emphasis in original omitted).

[16] *Nader*, 520 F.2d at 202.

[17] 47 U.S.C. § 154(i).

tion essentially by any means it chooses, including a refund order.

This reasoning is fallacious in two respects. First, a rate of return prescription is not a prescription order within the meaning of Section 205. Section 205(a) empowers the FCC to prescribe "the just and reasonable . . . *charge* or *charges* to be thereafter observed."[18] When the FCC prescribes a carrier's charge, it specifies an amount, and both the carrier and its customers know that is the amount that the carrier is to charge and the customer is to pay, and neither expects (nor can obtain) any adjustments.[19] In contrast, when the FCC prescribes a rate of return, the carrier uses that rate of return in calculating its rates, but neither it nor its customers will know whether it has achieved (or exceeded) that rate of return until after the fact. And, as has been discussed elsewhere,[20] if the carrier is to be held to its prescribed rate of return retroactively, it will virtually always be recouping shortfalls or refunding surpluses, thereby effectively eliminating the prospectivity of Section 205 from the Act.

Second, Section 4(i) cannot be used to circumvent the specific substantive provisions of the Act.[21] The specific

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[18] 47 U.S.C. § 205(a) (emphasis added).

[19] *See, e.g., Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389-90 (1932).

[20] *See supra* n.14.

[21] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) ("we would be disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose"); *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1194 (D.C. Cir. 1985) (Commission's authority cannot be released "from the tie that binds it to the text [of Title II] Congress enacted"); *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 375 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978);

provisions of the Communications Act discussed above reflect a deliberate decision by Congress that, except as specified in Section 204(a), which is not relevant here, ratemaking is to be prospective. Adherence to that principle is both balanced and fair: since a carrier cannot go back to its customers to make up any shortfalls, it should not have to pay them any amounts that are determined after the fact to be surpluses. It also preserves incentives for a carrier to economize: if the carrier's costs exceed its estimates, it cannot seek reimbursement from its customers, whereas if it is able to realize efficiencies, it can benefit from them at least for the period of regulatory lag. Finally, as noted by Judge Starr in his concurrence in the *Rulemaking Case*, a scheme in which carriers are required to make refunds for past surpluses "does clear violence to the values of stability and predictability that Congress so carefully enshrined in the Communications Act." [22]

In sum, an agency must follow its governing statutory scheme, remaining faithful to both its terms and intent. The court below improperly sanctions the use of the general provisions of Section 4(i) in a fashion that disrupts that scheme. Moreover, the court's decision is clearly contrary to a host of other decisions interpreting the Communications Act and related statutes applicable to other

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*American Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 876-80 (2d Cir. 1973). *See also Public Serv. Comm'n v. FERC*, No. 87-1706, slip op. at 9-10 (D.C. Cir. Jan. 27, 1989) (" 'Section 16 [of the Natural Gas Act, the equivalent of Section 4(i) of the Communications Act], which uses a broad generality of "necessary or appropriate" that is not rooted in a function, cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined.' ") (quoting with approval *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1257 (D.C. Cir. 1973)).

[22] *Rulemaking Case, supra* n.4, 836 F.2d at 1394, New England App. at 155a (Starr, J., concurring).

industries.[23] Such action clearly warrants exercise by this Court of its certiorari jurisdiction.

## CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted.

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[23] Petitioners have cited many decisions from both this Court and various courts of appeals that affirm the basic tenet that current and future ratemaking should not become embroiled in making corrections " 'for excess or insufficiencies of rates charged in the past.' " Southern Bell Pet. at 9; New England Pet. at 14 (quoting *American Pub. Gas Ass'n v. FPC*, 567 F.2d at 1057). *See, e.g., Atlantic Refining Co. v. Public Serv. Comm'n*, 360 U.S. 378, 389 (1959); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 184 (D.C. Cir. 1986); *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 492 (D.C. Cir. 1985); *Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d 336, 345 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975). *See also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956). We do not repeat that discussion here, other than to emphasize that all of these cases are grounded upon a faithful reading of the applicable statutes, each of which parallels the Communications Act.